

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL NO.1151 OF 1978

THE HON'BLE MR. JUSTICE Y.B. BHATT:

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1. Whether Reporters of Local Papers may be allowed to see the judgement?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Appearance:

Mr. S.R. Divetia, advocate for the appellant.
Mr. V.C. Desai, advocate for the respondents.

CORAM: Y.B. BHATT J.

Date of Decision: 06-02-1996

JUDGEMENT

1. This is an appeal under section 96 of Civil Procedure Code wherein the appellant is the original first defendant, the first respondent is the original plaintiff and respondent nos.2 to 5 are the original defendant nos.2 to 4 respectively.
2. The minor plaintiff had filed a suit through his guardian and next friend (his mother) against the first

defendant, a purchaser of the specified interest in HUF property from the father of the minor plaintiff, against the defendant no.2-the plaintiff's father, against defendant nos.3 and 4 - the paternal uncles of the plaintiff, and against defendant no.5- the mother of the plaintiff's father, averring that the property bearing Municipal Census No.1536 and City Survey No.47 of Bardolpura in the city of Ahmedabad, originally belonged to the plaintiff's paternal grandfather Girdharlal, who died on 14th May 1944, leaving behind him his widow defendant no.5 and three sons viz. defendant nos.2, 3 and 4. The second defendant, the vendor of the sale in question has a minor son who is the plaintiff, two other daughters and a wife who is the next friend and guardian of the minor plaintiff.

3. The minor plaintiff averred, particularly in para 5 of the plaint, that his father-the second defendant, was negligent in maintaining the family and had illicit relations with a concubine, that he was leading an immoral life, and without any legal necessity of the family he sold his undivided share in the above ancestral property on 27th November 1972, to the first defendant. It is averred that the said sale was neither for legal necessity nor for payment of antecedent debts, and that the sale was for immoral purposes, and according to the plaintiff it was also without consideration and therefore the same was void and not binding on the plaintiff's interest in the said property. The relief prayed for in the suit seeks a declaration that the sale effected by the second defendant in favour of the first defendant was void and/or not binding upon the interest of the minor plaintiff in the said property, and a consequential injunction restraining the first defendant from taking possession of the suit property or part thereof.

4. The first defendant (purchaser of the share of the second defendant) filed his written statement at Exh.13 contending that the plaintiff is put to proof as regards the ancestral nature of the property and that the plaintiff had some interest therein, that the second defendant had sold his undivided interest in the property with the knowledge and with the consent of the plaintiff's mother in the sum of Rs.10000/-, and the possession of the second floor of the house (which was with the vendor and his wife) was handed over to the vendee, that the paraphernalia therein were also sold for an adhoc sum of Rs.500/- and that the first defendant had lawfully become the owner of the said property thereby. This written statement denied the plaintiff's allegation as regards the second defendant living with a concubine and leading an immoral life, and that the sale was without legal necessity and/or for payment of immoral debts and/or was without consideration. It was further contended that even in case the

plaintiff had any interest in the suit property, the same was binding on the plaintiff inasmuch as the sale was for payment of moral debts of the second defendant and also for legal necessity.

5. Defendant nos.3, 4 and 5 have filed their written statements supporting the plaintiff. It is pertinent to note that the second defendant (father of the plaintiff) had remained absent and had not defended the suit.

6. The trial court framed issues at Exh.21 and after recording the evidence in the matter and hearing the parties, recorded findings of fact to the effect that the property in question was ancestral property of the defendant nos.2 to 4 and therefore minor plaintiff had a definite interest therein, that the plaintiff is in possession of the second floor of the suit house and defendant no.1 has failed to prove that he was handed-over the physical possession by the second defendant under the sale transaction in question, that the sale by the second defendant of his undivided interest in the HUF property in favour of the first defendant was not for legal necessity and was not effected for the maintenance of his family, and that the sale by the second defendant in favour of the first defendant was for valuable consideration. The trial court, therefore, substantially decreed the plaintiff's suit as prayed for by granting the declaration and consequential injunction. The trial court, however, while decreeing the suit, has gone beyond the specific prayer made in the suit plaint, which will be discussed hereinafter.

7. Being aggrieved by the judgement and decree of the trial court the first defendant-purchaser has preferred the present appeal.

8. There is practically no contest in respect of the issue as to whether the suit property is the ancestral property of defendant nos.2 to 4. In fact, the sale deed in question at Exh.37 admittedly contemplates the sale of the undivided share of the second defendant in favour of the first defendant. This recital also establishes that the suit property was the ancestral property forming part of the larger HUF of Girdharlal viz. the father of the second defendant-vendor. Even otherwise, Hansaben, mother of the plaintiff has asserted in her deposition at Exh.24 that the suit property belonged to Girdharlal and there is no cross-examination on this point. Thus, there cannot be any controversy in the conclusion that the property belonged to Girdharlal and on his demise on 14th May 1944 the interest therein devolved upon the co-sharers in accordance with Hindu Law. For the moment we are not concerned with the extent of the share of such co-sharers in such property, inasmuch as we

are merely concerned with the undivided interest of the second defendant in the said property. Similarly the fourth defendant Amratlal has deposed at Exh.35 and asserted that the suit house was ancestral property in their hands, that the same has not been partitioned and remains joint between the coparceners. Again this assertion is not challenged by the first defendant in the cross-examination of the deponent. In his turn, the first defendant, in his deposition at Exh.44, does not depose anything to the contrary, but merely states that he is not aware whether the property belonged to Girdharlal and on his death it devolved upon the defendant nos.2, 3 and 4. Furthermore, the certified copies of the extract from the Property Register at Exhs.16, 17 and 18 also show that the property belonged to Girdharlal and on his demise devolved upon defendant nos.2, 3, 4 and 5.

9. On the demise of Girdharlal the property devolved upon defendant nos.2, 3, 4 and 5, who held the same as property belonging to the Hindu Undivided Family of Girdharlal. Obviously, therefore, each of them had some share and/or interest in the said property, and such share or interest would be and could be quantified only as and when there was a partition amongst them. It is, therefore, obvious that the second defendant, as one of the sons of Girdharlal, had an undivided interest in the property and since such interest was in a property which is the asset of the HUF of Girdharlal, the plaintiff in turn, as the son of the second defendant had an interest in the interest of the second defendant. Under the circumstances and on the unimpeachable evidence on record, it must be held that the minor plaintiff has an interest in the suit property.

10. The next question which requires to be considered is whether the plaintiff's interest can be transferred and/or sold by the second defendant, and if so under what circumstances would such transfer be permissible in law.

11. Hansaben, mother of the minor plaintiff has deposed at Exh.24. She has deposed that her husband, the second defendant has abandoned the house and home since the last eight years or so, failed and neglected to maintain her and their children, that he had immoral and illicit relationship with a woman by the name of Pragna since about eight years, she was not aware of the sale effected by the second defendant at the time of the sale, and that the family had no debts to pay for which the second defendant would be under any compulsion to dispose of the property. She further asserted that she did not know whether the second defendant had received consideration in respect of the sale and further asserted that the second defendant did not hand-over physical possession of the second floor of the house in favour of the

first defendant in pursuance of the sale deed, and that she and her family continued to retain possession of the same. The only thing brought out in her cross-examination is that her husband viz. the second defendant was demanding his share in the property from his brothers. Some attempt has been made in her cross-examination to elicit the financial weakness of the family and/or to establish that the marriage expenses in respect of the fourth defendant were made by obtaining loans from others. However, she denies these suggestions and has continued to assert that the family did not have any debts prior to 1972.

12. Similarly Amratlal, defendant no.4, in his deposition at Exh.35, states that his brother the second defendant was not engaged in any occupation for the last ten years, that Amratlal has not seen him during the said period, and that the latter indulged in immoral co-habitation with a woman by the name of Pragna, that the first defendant was not inducted in possession of any part of the house, and that he, the deponent, was not aware of the reasons why Trikamlal sold his undivided interest in the property. He emphatically denies the suggestion that the financial condition of the family was not good when Girdharlal (his father) expired. He has also deposed as to the monthly income of other members of the family to indicate that the family was not in dire circumstances. In his cross-examination it has been elicited that Exh.31 is a notice issued to the second defendant Trikamlal by the rest of the family members, which refers to the debt said to have been incurred by Trikamlal from the family members. He emphatically denies a suggestion that the movable property of the family has been partitioned. He does admit that after the death of his father the business conducted in a rented shop at Kalupur was required to be sold away together with the goodwill and tenancy rights, and the sale realisation was utilised for the maintenance of the larger family and for paying up the debts as they stood at that point of time. He also admits that some debt was incurred to marry his sisters Nirmalaben and Kapilaben. However, he does not admit that the amount obtained by the sale consideration by the second defendant from the sale of his share in the suit property was utilised for the maintenance of the family of the second defendant. This aspect, however, has been established in the deposition of the plaintiff's mother at Exh.24. Thus, it cannot be said that the defendant utilised the sale proceeds for the maintenance of his own family.

13. Thus, from the aforesaid evidence it becomes clear and beyond controversy that at least the family members of the second defendant have no knowledge as to whether the second defendant received any consideration for the sale of the

latter's undivided share in the suit property.

14. In this context it is relevant to note the assertion of the first defendant viz. the purchaser at Exh.44. According to the first defendant, although he had paid to the second defendant the sale consideration mentioned in the sale deed, at the same time the first defendant recovered some money owed to him by the vendor, and out of the balance the second defendant also paid certain other debts.

15. In the context of the above evidence I am in complete agreement with the trial court in concluding that the first defendant's oral evidence, when seen in the context of the evidence led on behalf of the plaintiff, has established the payment of consideration as stated in the Sale Deed Exh.46. It is significant to note that the second defendant has not participated in the proceedings. Thus, the trial court was justified in concluding that the consideration for the transaction as stated in exh.46 has been proved.

16. I may only briefly note here the relevant law required to be considered for the purpose of application to the facts of the case. There cannot be any controversy that a Karta of a Hindu Undivided Family or for that matter a co-parcener, has certain well established rights in respect of coparcenary property, and such interest held by the person in coparcenary property can only be parted with by way of sale, and would be binding on the co-parceners and on the progeny of such transferor provided the sale was for legal necessity or for payment of antecedent debts which are not tainted with immorality.

17. Similarly, there cannot be any controversy on the well settled position that where an interest in HUF property is transferred by a Hindu male, and the vendee contends that the sale binds not only the share of the vendor, but also the son of the vendor and other members of the HUF of the vendor, the burden of proof to show that the sale was for legal necessity or for payment of antecedent debt must rest upon the vendee. However, if the vendee succeeds in establishing that the sale was in fact for legal necessity and/or for payment of antecedent debts, the burden shifts upon the son of the vendor to establish that the debts for the payment of which the sale was effected, were debts tainted with immorality.

18. In this context it must be noted that there is no reliable evidence and absolutely no documentary evidence whatsoever to show that the second defendant had sold his interest in the HUF property on account of any legal necessity, if we understand legal necessity to mean the requirements of meeting the expenses of the plaintiff, the

plaintiff's mother and/or the two sisters of the plaintiff.

19. Clearly, therefore, the Trial Court was justified in concluding on the basis of the evidence on record, that the first defendant-vendee has failed to establish that the sale effected by the second defendant was for legal necessity. The oral evidence of the first defendant shows the extent of the so-called inquiry he had made at the time of the sale to satisfy himself about the legal necessity, and such inquiry can hardly be called an honest and bonafide inquiry. In fact, reading this evidence as a whole, it can hardly be called an inquiry at all.

20. Moreover, the sale deed in question, when examined from this perspective, is equally revealing. The sale deed does not mention in any manner whatsoever the reasons or causes as to why the second defendant was selling his share in the property, let alone an assertion that the sale was for legal necessity.

21. Under the circumstances it must be held that the first defendant-vendee has failed to prove legal necessity for the sale in question. Even otherwise from an examination of the evidence of other members of the larger HUF of Girdharlal i.e. Hansaben, Amratlal and Jayantilal, it is found that the family had sufficient income to maintain itself.

22. The Trial Court has also discussed in detail in paragraphs 25 to 36 of its judgement, other relevant evidence on the basis of which it has recorded a finding that the first defendant vendee has failed to establish legal necessity for the sale. Suffice it to state here that this appreciation on the part of the trial court is both fair and reasonable and it is not possible for this court to arrive at any other conclusion. Under the circumstances since legal necessity and/or antecedent debts are not established, it would not be necessary for the plaintiff to establish that the so-called debts had been incurred for immoral purposes.

23. In the premises aforesaid the trial court was justified in concluding that the sale effected by the second defendant in favour of the first defendant would not bind the interest of the plaintiff in the suit property which was HUF property.

24. As regards the controversy as to who is in possession of what portion of the suit house, it may be noted that the recital in the sale deed Exh.46 is to the effect that the vendee has been placed in possession of the third floor, whereas the contention of the vendee in his written statement is that he was placed in possession of the second floor. This

inconsistency in itself would militate against the vendee. The contention taken in the written statement would not and could not be substantiated by any evidence which he would be permitted to lead, looking to the restriction placed upon such evidence by section 92 of the evidence Act.

25. However, what is relevant is that issue no.3 framed by the trial court requires the plaintiff to establish that he is in possession of the second floor of the suit house. Apparently this issue is framed in this form, looking to the contention raised by the vendee in his written statement which pertains to the second floor of the suit house. In this context the relevant evidence has been discussed in paragraphs 40 to 43, of the trial court's judgement. I am in complete agreement with the interpretation of the evidence, and the conclusions drawn therefrom by the trial court. This issue is, therefore, correctly decided in favour of the plaintiff i.e. the plaintiff is found to be in possession of the second floor of the suit house.

25.1 Moreover it is also pertinent to note that had the vendee been in possession of any part of the suit house whatsoever, the plaintiff would necessarily have prayed for a relief for possession. To assume that the plaintiff neglected or omitted to make such a prayer, inspite of the vendee being in possession of part of the suit house, would only lead us to assume that the plaintiff would have been satisfied with a mere declaration as to the protection of his interest in the suit property, and would not be interested in safeguarding possession thereof. Such an assumption obviously goes contrary to common sense. Even otherwise, the suit property is the property of the HUF of Girdharlal, wherein there are other sharers. Obviously other sharers viz. Jayantilal, Amratlal, Kapilaben, etc. would not remain passive and inactive, had the vendee been placed in possession, and would not have rested content with the present suit of the plaintiff, knowing full well that even the present suit is not really for the benefit of anyone except the plaintiff himself. Thus, in the light of the evidence on record and also in view of the aforesaid observations, it must be held that issue no.3 has been correctly decided by the trial court.

26. However, in my opinion, the Trial Court has entered into a field or an area which was unnecessary for the purpose of granting appropriate relief to the plaintiff.

26.1 In this context it may be noted that although the plaintiff asserts that the vendor i.e. the plaintiff's father had one-fourth share in the HUF property, the plaintiff has not asked for any specific declaration that a particular share which the plaintiff had in the suit property be declared to

have been saved or excluded from the sale in question. In other words, the plaintiff had merely sought for a declaration that the plaintiff's interest in the undivided share his father held in the HUF property would not be affected by and would be outside the scope and purview of the sale deed in question, and that the sale would not, therefore, affect the interest of the plaintiff. To be more precise, the plaintiff has not asked for any declaration in respect of the quantification of his own interest in his vendor's share in the HUF property. Under the circumstances, it was not necessary, and in fact going beyond the prayer made in the suit, for the trial court to quantify the share of the plaintiff, as it has done. The trial court has quantified the share of the plaintiff in the suit property as one-twelfth. This quantification, as aforesaid, is not merely unnecessary, but also is factually wrong.

26.2 The suit property, as held hereinabove, was the HUF property of Girdharlal. The sharers in such property would be the members of the HUF of Girdharlal on the date when actual partition is effected. Now Girdharlal left behind him his widow Kapilaben, three sons viz. Jayantilal, Amratlal and Trikamlal, and two daughters viz. Nirmalaben and Kapilaben. Thus, as and when partition is effected in respect of the HUF property of Girdharlal, there would be six sharers, and thus, Trikamlal, the second defendant would have only one-sixth share. Therefore, the interest of the plaintiff, whatever it be, would be in respect of one-sixth of the HUF property as a whole. Moreover, the interest of the plaintiff in the aforesaid one-sixth share held by Trikamlal, cannot be determined on the date of the suit, inasmuch as it is quite possible that Trikamlal may perhaps beget a son or sons younger to the plaintiff; in other words, the plaintiff may yet hereinafter have younger brothers. Even otherwise there is evidence on record that the plaintiff does have two sisters by the name of Sonal and Rupal. Thus, when the share of Trikamlal is itself made the subject matter of a partition, it is not merely the plaintiff and his mother who would obtain a share therein, but also the two sisters of the plaintiff. It is, therefore, obvious that since the plaintiff has not asked for any declaration as to the quantification of his share, the trial court was not justified in quantifying the same. Consequently, even if the same was necessary for any other purpose, the same cannot factually be justified as declared by the trial court. On the facts and circumstances of the case as discussed hereinabove, it is not possible to quantify the shares of the various sharers in the suit property, which belongs to the HUF of Girdharlal.

26.3 There is yet another aspect of the matter viz. quantification effected by the trial court in respect of the

share of Hansaben i.e. the wife of the second defendant. Apart from the factual reasons stated hereinabove, the trial court was also not justified in quantifying her interest for the simple reason that Hansaben is not a plaintiff in the suit, and moreover has not asked for quantification of her share. Furthermore, such quantification is also factually incorrect, since it is based on the assumption that Trikamlal, his wife Hansaben and the minor plaintiff would be the only sharers in the share held by Trikamlal in the larger HUF of Girdharlal. As discussed hereinabove, both the assumptions are factually incorrect.

27. In the premises aforesaid, the decree passed by the trial court granting a declaration in favour of the minor plaintiff to the extent that the sale in question would not bind and/or adversely affect his interest in the suit property is sustained. Similarly, the permanent injunction issued against the first defendant from taking possession of any part of the suit property in pursuance of the sale deed Exh.46, except by suing for partition of his interest acquired by the said sale, is required to be upheld.

28. However, the decree so far as it quantifies the interest of the minor plaintiff and the interest of the plaintiff's mother in the suit property cannot be sustained and to this extent the decree requires to be modified.

29. To conclude, therefore, it is hereby declared and decreed that the sale effected by Sale Deed Exh.46 dated 27th November 1972, by defendant no.2 Trikamlal Girdharlal Shah in favour of first defendant Dhanjibhai Kalidas Patel, of his undivided interest in property bearing City Survey No.47 of Bardolpura, Ahmedabad is not effective and not binding on the interest of the minor plaintiff Chetan Trikamlal, and the first defendant is permanently restrained from taking possession of any part of the said property in pursuance of the aforesaid Sale Deed, except by enforcing a due partition of his interest acquired under the Sale Deed in question.

30. In the premises aforesaid, the decree of the trial court is sustained, subject to the modification as discussed hereinabove.

31. This appeal, therefore, fails and is accordingly dismissed with no order as to costs.
